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NOTES OF RECENT CASES.

Madhavan Nair and Jackson, JJ.
2nd May, 1928.

C.M.A. No. 559 of 1925 and C.M.A. No. 70 of 1926.

Civil Procedure Code, O. 21, Rr. 66 and 69—Sale without fresh proclamation—Waiver by judgment-debtor—Non-mention of the upset price—If a material irregularity.

Failure to publish the sale proclamation is not an illegality vitiating the sale but an irregularity which can be waived by the judgment-debtor.

Omission to state upset price in the sale proclamation is not a material irregularity or fraud under O. 21, R. 90.

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Appellants.

K. V. Krishnaswami Aiyar and *V. Rajagopala Aiyar* for Respondents.

N. S.

The Chief Justice, Beasley and Madhavan Nair, JJ.
7th May, 1928.

Ref. Case No. 19 of 1927.

Indian Income-tax Act (1922), *S.* 10 (2) (*iii*)—*Borrowed capital—Failure of the business—Interest whether deductible.*

Where a person carrying on banking business borrows money and invests it in a separate piecegoods business and that business subsequently fails and the sum invested is lost,

Held, the interest on the borrowed money must be deducted under S. 10 (2) (*iii*) in computing the profits and gains of the banking business.

K. V. Krishnaswami Aiyar and *V. Rajagopala Aiyar* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

N. S.

Ramesam, J. Cr. M. P. No. 350 of 1928.
28th June, 1928.

Criminal Procedure Code, Ss. 435 and 439—Complaint for the offence of perjury—Complaint not disclosing the facts necessary to constitute the offence—Power of High Court to quash proceedings.

Where a complaint was preferred under S. 476, Criminal Procedure Code, by the 1st Class Magistrate against the petitioner for the offence of giving false evidence and the complaint on the face of it did not contain the several facts to constitute the offence,

Held, the High Court had powers to interfere and quash the proceedings as no case had been made out.

39 M. 561 referred to.

K. S. Jayarama Aiyar and *V. Rajagopala Aiyar* for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Wallace, J. C. R. P. No. 510 of 1927.
18th July, 1928.

Material alteration—Promissory note—One of the executants not a marksman but a signatory—Putting on his mark—If amounts to material alteration.

Where it was found that, though a promissory note purported to be executed by two persons, it bore only the mark of one of them who was not a marksman but a signatory, and the plaintiff was also a party to the fraudulent getting up of the note as if executed by that person by affixture of his mark thereto,

Held, that it amounted to material alteration of the promissory note so as to disentitle the plaintiff from getting a decree even against the other admitted executant of the pronote.

26 M.L.J. 257 followed.

A.I.R. 1925 Mad. 929 not followed.

K. Venkateswaran for Petitioner.

T. M. Ramaswami Aiyar for Respondent.

N. S.

Reilly, J. S. A. No. 206 of 1927.
18th July, 1928.

Civil Procedure Code, O. 22, R. 4—Death of respondent in appeal—Some only of the legal representatives added within the period of limitation—Effect.

Where, on the death of a respondent in an appeal, some only of his legal representatives were brought on record within the period of limitation,

Held, that the estate must be deemed to have been sufficiently represented by them and the appeal did not abate either as against the legal representatives added within the period of limitation or against the other legal representatives.

V. Ramaswami Aiyar for *K. Rajah Aiyar* for Appellant.

Ch. Raghava Rao and *A. K. Ramachandra Aiyar* for Respondent

N. S.

Reilly, J. S. A. No. 755 of 1925.
25th July, 1928.

Negotiable Instruments Act, S. 27—Promissory note—Execution by a partner of a firm—Recital that amount borrowed for the purpose of the firm—Personal liability of the partner who did not sign.

Where a promissory note was executed by one partner only of a firm in favour of the plaintiff and the note contained a recital to the effect that the debt was for the purpose of the business of the firm,

Held, the partner who did not sign the promissory note was also personally liable.

17 M.L.J. 126; 46 C. 663 (P. C.) referred to.

K. V. Krishnaswami Aiyar for Appellant.

S. Varadachariar and *S. V. Venugopalachariar* for Respondent.

N. S.

Wallace, J S. A. No. 124 of 1925.
26th July, 1928.

Partnership—Execution by one partner of a mortgage bond in favour of the firm—Another partner receiving the mortgage bond on settlement of accounts without actual assignment—Suit by the latter on the mortgage bond—Maintainability.

Where a mortgage bond was executed by a partner of the firm in favour of the firm and the bond was simply handed over to another partner in respect of his share on the termination of the partnership and settlement of accounts without being actually assigned to him, and the latter instituted a suit on the mortgage,

Held, that the suit was maintainable even though there was no assignment as contemplated by S. 30 of the T. P. Act.

11 M. L. T. 246 referred to.

T. V. Venkatarama Aiyar for Appellant.

K. S. Krishnaswami Aiyangar and *K. S. Champakesa Aiyangar* for Respondent.

N. S.

Curgenven, J.
27th July, 1928.

Cr. M. P. No. 458 of 1928.

Criminal Procedure Code, S. 177—Commitment to a Court not having jurisdiction—Validity—Transfer.

A commitment order to a Sessions Court within whose jurisdiction the alleged offence did not take place is bad and must be quashed. The High Court had no jurisdiction to transfer the case to the Court of right jurisdiction.

36 M. 387 followed.

T. R. Venkatarama Sastri for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Reilly, J.
27th July, 1928.

S. A. Nos. 751, 884 to 886 of 1924.

Madras Abkari Act—Partnership with sole licensee—Legality—Suit for dissolution of partnership—Plea of illegality by one defendant—Whether res judicata *as against other defendant.*

A partnership with a person holding a licence under the Madras Abkari Act to sell toddy is not *prima facie* illegal, there being nothing in the Act itself prohibiting it. Case-law reviewed.

(1910) M. W. N. 549 and 51 M. L. J. 12 referred to.

Where only one of the two defendants in a suit for dissolution of partnership raises the plea of illegality of the partnership, the other defendant resisting the suit on other pleas, and the suit is dismissed on the plea of illegality, the decision as to illegality is not *res judicata* as between the plaintiff and the other defendant.

P. Somasundaram for Appellant in S. A. No. 751 and Respondent in S. A. Nos. 884 and 886 of 1924.

B. Satyanarayana (*K. Bhimasankaram* with him) for Respondent in S. A. No. 751 and Appellant in S. A. Nos. 884 to 886 of 1924.

N. S.

Curgenven, J.
30th July, 1928.

C. M. P. No. 1214 of 1928.

Letters Patent (Madras), cl. 18—Insolvency petition under the Provincial Insolvency Act—Application for transfer of the petition to the High Court—Jurisdiction of the High Court.

Under cl. 18 of the Letters Patent, a Judge of the High Court sitting in Insolvency has no jurisdiction to try an insolvency petition under the Provincial Insolvency Act, and the High Court is not competent to transfer an insolvency petition filed under the Provincial Insolvency Act.

25 M. L. J. 299 followed.

O. Thanikachalam Chetti for Petitioner.

G. T. Ramanujachari for Respondent.

N. S.

The Chief Justice and
Pakenham Walsh, J.
31st July, 1928.

Cr. Rev. Case No. 451 of 1928.

Criminal Procedure Code, S. 488—Maintenance order—Execution of—Jurisdiction of the Court passing the order when the party lives outside the jurisdiction of that Court.

The Court which passed the order of maintenance has jurisdiction to execute the same by the issue of a warrant even though the person against whom execution is sought is not within the Court's jurisdiction.

K. Sankara Sastri for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Devadoss and
Mackay, JJ.
31st July, 1928.

Appeal No. 95 of 1927.

Income-tax Act, S. 67—Income arising from fisheries and forest revenue—Assessment of—Assessee's payment of the tax—Mistake of law—Maintainability of suit for recovery of tax paid.

The assessee who was the owner of a permanently settled estate governed by the Permanent Settlement Regulation, paid income-tax on income arising from fisheries and forest revenue under a *bona fide* impression that he was bound to pay income-tax on such income. In a suit against the Government for the recovery of the amount paid.

Held, that the payment was made under a mistake of law and could not be recovered.

Held also that in respect of assessments which were clearly '*ultra vires*' S. 67 of the Income-tax Act would not be a bar to the maintainability of a suit in a Civil Court.

N R C

A. Krishnaswami Aiyar and *R. Ramamurthi* for Appellants.

The Government Pleader for Respondent.

N. S.

Kumaraswami Sastri, J. Appln. No. 503 of 1927.
31st July, 1928.

Damages—Right to recover—Assignability.

A right to recover damages cannot be assigned.

K. S. Krishnaswami Aiyangar for Applicant.

Sir C. P. Ramaswami Aiyar and *D. R. Venkatesa Aiyar* for Respondent.

N. S.

Devadoss and Mackay, JJ. A. S. No. 175 of 1923.
31st July, 1928.

Religious endowment—Office of Dharmakartaship—Whether alienable.

The office of Dharmakartaship is inalienable.

A. Krishnaswami Aiyar for Appellants.

G. Lakshmanna and *Y. Govindarajalu* for Respondents.

N. S.

Curgenven, J. Cr. Rev. Case No. 85 of 1928.
1st August, 1928.

Criminal Procedure Code, S. 256—Magistrate asking the accused to cross-examine prosecution witnesses immediately after framing charge—Reasons for such procedure—Failure to record —Legality.

Failure to record reasons by the Magistrate for asking the accused to cross-examine the prosecution witnesses immediately after framing a charge against him, amounts to an illegality vitiating the trial.

50 M. 740 followed.

V. L. Ethiraj for Petitioner.

K. Venkatraghavachari for Public Prosecutor.

N. S.

The Chief Justice and Pakenham Walsh, J. Cr. Appeal No. 51 of 1928.
1st August, 1928.

Evidence Act, S. 143—Leading questions in cross-examination —Refusal of the Judge to allow—Legality.

The refusal of a Judge to allow the vakil to put leading questions in cross-examination is illegal and vitiates the whole proceeding.

V. L. Ethiraj and *N. Somasundaram* for Appellant.

The Public Prosecutor for the Crown.

N. S.

The Chief Justice, Ramesam and Pakenham Walsh, JJ. Ref. Case No. 10 of 1927.
2nd August, 1928.

Indian Stamp Act—Applicability to scheduled districts and Agency Tracts.

The Indian Stamp Act, which applies to the whole of British India by virtue of the provisions of S. 3 (7) of the General Clauses Act is in force in the Agency Tracts and scheduled districts.

P. Venkataramana Rao for the Government.

B. Satyanarayana for the Party.

N. S.

Wallace, J. S. A. No. 216 of 1927.
2nd August, 1928.

Malabar Law—Putravakasam *property—Seniormost female—Right of management—Demise before expiry of period—Validity.*

(1) Property given by a husband to a wife and children is *putravakasam* and not *strisottu.*

(2) There is nothing in Malabar Law or usage against a female managing such properties.

(3) Demises granted by such manager before the expiry of the periods under prior demises are invalid.

K. P. M. Menon and *A. S. Srinivasa Aiyar* for Appellants.

P. Govinda Menon for Respondents.

N. S.

Kumaraswami Sastri, J. C. S. No. 227 of 1928.
2nd August, 1928.

Receiver—Appointment of—Suit upon simple mortgage.

The Court cannot appoint a receiver in a suit upon a simple mortgage, as the relief for possession, which the Court has no power to grant even by way of decree in the suit cannot be granted in an interlocutory application therein.

22 L. W. 579 followed.

T. V. Viswanatha Aiyar for Plaintiff.

P. Srikantam for Defendant.

N. S.

Ramesam and Venkatasubba Rao, JJ. A. S. No. 32 of 1924.
6th August, 1928.

Hindu Law—Adoption—Anti-adoption agreement—Reservation of reasonable portion of the property for widow—Validity.

An anti-adoption agreement by which the adoptive father reserves a reasonable portion of the estate absolutely for his wife is not invalid.

S. Varadachari and *S. V. Venugopalachari* for Appellant.

T. R. Ramachandra Aiyar, K. S. Venkataramani, T. V. Ramanathan and *S. Panchapakesa Aiyar* for Respondents.

N. S.

Reilly, J. S. A. No. 1153 of 1924.
6th August, 1928.

Civil Procedure Code, O. 21, Rr. 90 and 92—Decree against a Hindu widow—Husband's property sold in execution—Right of reversioner to apply to have the sale set aside—Bar of suit.

In execution of a decree obtained against a Hindu widow, the properties of her husband were sold. The reversioner brought a suit for a declaration that the Court sale would be binding only during the lifetime of the widow and would not be binding on him as a reversioner.

Held, the reversioner ought to have applied under O. 21, R. 90, Civil Procedure Code to set aside the Court sale and he would not have a right of suit in default of such application, the same being barred under O. 21, R. 92 (3).

44 M. 351 and 24 L. W. 406 referred to.

K. Periasami Gounder for Appellant.

N. Doraisami Aiyar for Respondent.

N. S.

Reilly, J. S. A No. 824 of 1925.
6th August, 1928.

Limitation Act, Ss. 4 and 6—Three years' period mentioned in S. 6—Expiry during the vacation of the Court—Institution of the suit on the re-opening of the Court—Whether barred.

Where a suit was instituted on the re-opening of the Court, though the three years' period mentioned in S. 6 had expired during the vacation of the Court,

Held, that the suit was within time because Ss. 6 and 4 must be read together and the words "period prescribed" in S. 4 meant not only the period prescribed in the 1st Schedule of the Limitation Act but also such periods as were modified or extended by the provisions of S. 5 to S. 22 of the Act.

C. Rama Rao for Appellant.

P. Somasundaram for Respondent.

N. S.

Before Reilly, J. S. A. No. 756 of 1925.
31st July, 1928.

Malabar Tenants' Compensation Act I of 1900, S. 19—First lease in 1884 fixing rates of compensation—Subsequent renewals in 1897 and 1908—If tenant entitled to contract rate or rates, under the Section.

Where the property was originally leased to a tenant in 1884, which fixed rates of compensation and this was renewed in 1897 and 1908 and the present suit was brought in ejectment and the tenant claimed compensation under the Act.

Held, that the tenant is entitled only to contract rates for improvements prior to 1897 and for subsequent improvements he is entitled to rates only under the Act.

40 M. 594 followed.

S. A. 215 of 1924 not followed.

K. P. Ramakrishna Aiyar for Appellant.

D. A. Krishna Variar for Respondent.

N. S.

Wallace, J. Cr. Rev. Case No. 350 of 1928.
10th August, 1928.

Local Boards Act, Ss. 141, 142, 144 and 220—Burial of the dead body in an unlicensed place—Complaint preferred three months after the offence—If barred by limitation.

The accused was charged with an offence under S. 144 of the Local Boards Act for having buried the dead body of his brother in a place which was not duly licensed therefor. A complaint was preferred by the Taluq Board President three months after the commission of the alleged offence.

Held, that the complaint was out of time as under S. 220 it should be preferred within three months.

Held, further, that Ss. 141 and 142 of the Local Boards Act would be applicable only to cases where a place was sought to be used generally for burying dead bodies.

S. T. Srinivasagopalachari for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Reilly, J. Cr. Rev. Case No. 257 of 1928.
10th August, 1928.

Criminal Procedure Code, Ss. 144, 435 and 439—Proceedings under S. 144—Executive in their character—No revision lies to the High Court.

Where a Sub-Magistrate to whom a petition to take action under S. 144 of the Criminal Procedure Code was presented, dismissed it on the ground that the case properly fell under S. 147

of the Code and an application was made to the District Magistrate under sub-S. (4) of S. 144 who set aside the Sub-Magistrate's order and ordered enquiry on the same, and a revision was filed in the High Court under Ss. 435 and 439 of the Code against the District Magistrate's order,

Held, that proceedings under S. 144, Criminal Procedure Code, are executive in their character and consequently no revision lies to the High Court under Ss. 435 and 439 of the Code.

47 M. 56 and Cr. R. C. No. 400 of 1928 followed.

F. S. Vas for Petitioner.

C. A. Seshagiri Sastri and *K. Chandrasekharan* for Respondent.

[The learned Counsel for the petitioner also argued that the decision in Criminal Revision Case No. 400 of 1928 was erroneous and should be reconsidered and that the matter should be referred to a Bench of two Judges.—Ed.]

N. S.

Mackay, J. C. R. P. No. 1387 of 1927.
14th August, 1928.

Civil Procedure Code, O. 21, R. 2—Payment of amount towards decree—Payment not recorded in Court—Execution application mentioning the receipt of payment—Effect—Limitation Act, S. 20—Payment by judgment-debtor—Payment not specified whether for principal or interest—Bar when will save limitation.

Under O. 21, R. 2, Civil Procedure Code, Certificate of payment of amount towards decree can be made at any time and consequently the execution application wherein the amount was mentioned as paid can be treated as intimation to the Court of payment.

A payment by judgment-debtor to save limitation must be a payment towards principal or interest *as such* due under the decree. Where at the time of payment the judgment-debtor did not make any specific appropriation, the payment cannot be said to be a payment towards interest as such, even though at the time when the payment was made, a larger sum than the amount paid was due towards interest. The appropriation by the decree-holder the payment towards interest as such could not save limitation.

T. V. Muthukrishna Aiyar for Petitioner.

A. S. Sivakaminathan for Respondent.

N. S.

Madhavan Nair and Thiruvenkatachariar, JJ. C. M. A. No. 249 of 1927.
15th August, 1928.

Civil Procedure Code, O. 41, R. 23—Order of remand—Inherent power of Court—Appeal.

In a suit instituted by the plaintiff against his deceased brother's wife claiming that a certain policy taken by the husband of the defendant in a life insurance company was joint family property, it was found that the deceased had a general education out of the expense of joint family funds. The District Munsif consequently dismissed the plaintiff's claim. The District Judge, on appeal, held that the trial court had not adverted to the real points in the case and remanded the suit for fresh disposal after framing new issues.

Held, that the order of remand could not be one under O. 41, R. 23, as the decision of the District Munsif which was reversed was not upon a preliminary point, but the order was passed under the inherent jurisdiction of the Court and therefore no appeal lay.

E. Krishnamurthi for Appellant.

K. Ramamurthi for Respondent.

N.S.

Wallace, J. S. A. No. 1246 of 1925.
15th August, 1928.

*Malabar Law—Karnavan—*Ex parte *decree against Tarwad —Negligence of Karnavan—If binding on Tarwad.*

Where a Karnavan contested a suit in the first court, but was *ex parte* in appeal, as the tarwad was not sought to be made liable, but the appellate court passed a decree against the tarwad, and it was sought to be set aside on the ground of negligence of the Karnavan as he had good grounds of defence,

Held, that the Karnavan was not bound to defend every suit or appeal and if he honestly thought he need not defend and a decree is passed, it binds the tarwad.

20 M. 129 followed.

48 M. L. J. 351 referred to.

V. P. Karunakaran Nambiar for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

N. S.

Wallace, J. Cr. R. C. No. 214 of 1928.
15th August, 1928.

Penal Code, S. 268—Madras Local Boards Act, S. 162—If controls the former—Criminal Procedure Code, S. 537—Failure to take a sworn statement from the complainant—If illegal.

The fact that provisions have been made in the Madras Local Boards Act for preventing and dealing with the offence of public nuisance would not exclude the operation of S. 268, Indian Penal Code.

Failure to take a sworn statement from the complainant will not render the proceedings invalid as the same is merely an irregularity and not an illegality.

Watrap Subramania Aiyar for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Madhavan Nair, J. S. A. No. 854 of 1925.
16th August, 1928.

Practice—Suit—Agreement to abide by the result of connected suit, made orally to the court—Binding nature.

Plaintiff instituted a suit for an injunction against the 1st defendant in respect of an odai over which he and 2nd defendant had joint ownership. Subsequently he instituted a suit for partition against the 2nd defendant in respect of the land adjoining the said odai. He agreed by oral statements made to the court that if in the partition suit the land was allotted to the 2nd defendant, he would not prosecute his suit for injunction, which was therefore adjourned from time to time to await the result of the partition suit.

The partition suit ended in a compromise by which the land adjoining the odai was allotted to the 2nd defendant. The court dismissed the plaintiff's suit.

Held, that the dismissal was right, and that plaintiff should not be allowed to resile from his previous agreement.

B. Sitarama Row for Appellant.

S. Venkatachala Sastri for Respondent.

P. R. N.

Ramesam, J. C. R. P. No. 1160 of 1927.
17th August, 1928.

Landlord and tenant—Purchase of a portion of Agraharam—Liability for entire kattubadi—Civil Procedure Code, S. 115—Interference by High Court.

A purchaser of a portion of an Agraharam is liable only for a proportionate share of kattubadi on the Agraharam, and not for the entire kattubadi.

The High Court can interfere in revision, considering the far-reaching consequences of the case.

V. Pattabhirama Sastri for Petitioner.

T. Ramachandra Rao for Respondent.

N. S.

Reilly, J. Cr. R. C. No. 208 of 1928.
17th August, 1928.

Criminal Procedure Code, S. 199—Complaint by father for the offence of enticement of his married daughter while his son-in-law is alive—If maintainable.

The father of a married girl cannot prefer a complaint for the offence of enticement of his daughter while her husband is alive.

V. L. Ethiraj and *A. S. Sivakaminathan* for Petitioner.

The Public Prosecutor for the Crown.

A. Srirangachari for Respondent.

N. S.

Reilly, J. Cr. R. C. No. 344 of 1928.
17th August, 1928.

Criminal Procedure Code, S. 145—Omission to give reasons for the order—Legality of the order.

Where the Sub-divisional Magistrate merely filled the Form No. 22 of the 5th Schedule to the Criminal Procedure Code and did not give any reasons for passing the order under S. 145,

Held, that the order was illegal.

C. Narasimhachari for Petitioner.

M. S. Venkatramier for Counter-petitioner.

K. N. Ganapathi for the Public Prosecutor.

N. S.

Wallace and Thiruvenkatachariar, JJ. C. R. P. No. 762 of 1927.
20th August, 1928.

Civil Procedure Code, O. 21, R. 90—Grounds for setting aside sale—Questions to be considered—Minor defendant attaining majority after decree—Execution application—Notice of, not served on him—Sale if void.

The only questions to be considered in a petition under O. 21, R. 90 are (1) whether there was material irregularity or fraud in publishing and conducting the sale, and (2) whether there was any loss consequent to such irregularity or fraud. Where the Court considers these questions and finds that there was no substantial loss or injury, the sale should not be set aside.

It cannot be laid down that failure to serve notice of the execution application on a defendant who attains majority after decree, vitiates the sale.

A. S. Srinivasa Aiyar for Petitioner.

Dr. V. K. John for Respondent.

N. S.

N R C

Odgers, J. S. A. No. 1048 of 1928.
22nd August, 1928.

Promissory note—Payee executing Varthamanam on the same day agreeing to instalment payments within three years by the promissor—Validity of Varthamanam.

Where the defendant executed a promissory note for a certain sum in favour of the plaintiff, and the plaintiff on the same day executed a Varthamanam letter to the defendant to the effect that he would receive the amount due under the pro-note in instalments within three years,

Held, that the effect of the Varthamanam letter was to convert the promissory note under which money was payable on demand into an instalment bond and, as there was no consideration therefor, it was not enforceable.

T. Appaji Rao for *C. Sambasiva Rao* for Appellant.

T. M. Venugopal Mudaliar for Respondent.

N. S.

Reilly, J. Cr. R. C. Nos. 65 and 66 of 1928.
22nd August, 1928.

Canal and Public Ferries Act, S. 8—Notification by Government declaring portion of a river to be a ferry subject to the provisions of the Act—If ultra vires.

A notification issued by the Government under S. 8 of the Canal and Public Ferries Act declaring a portion of a river to be a ferry with the result that no person not duly authorised may convey goods, animals or passengers across the river within that portion, is clearly '*ultra vires*'.

C. Sidney Smith, Miss S. V. Devadoss and *P. Somasundaram* for Petitioner.

The Public Prosecutor for the Crown.

N. S.

The Chief Justice,
Beasley and Pakenham C. M. P. No. 471 of 1928.
Walsh, JJ.
23rd August, 1928.

Costs—Habeas Corpus *application—Withdrawal of—Power of Court to award costs.*

The Court has no power to award costs in a *habeas corpus* application which is withdrawn by the applicant.

K. S. Desikan for Petitioner.

V. V. Srinivasa Aiyangar for Respondent.

N. S.

Kumaraswami Sastri, J. C. S. No. 53 of 1924.
24th August, 1928.

Hindu Law—Inheritance—Sapinda relationship—Extent of degree requisite.

In determining the sapinda successionship, it is not the rule that seven degrees must be exhausted in one line before succession is traced to next line.

37 A. 604 (P.C.) referred to.

V. Raghunatha Sastriar for Plaintiff.

T. L. Venkatrama Aiyar, P. R. Ramakrishna Aiyar, V. Ramaswami Aiyar and *P. G. Krishna Aiyar* for Defendants.

N. S.

Madhavan Nair and Thiruvenkatachariar, JJ. C.M.A. No. 349 of 1927.
27th August, 1928.

Civil Procedure Code, Sec. 11—Decision between co-defendants in prior suit—When res judicata.

A decision between co-defendants in a suit will have the effect of *res judicata* only if such a decision was necessary for giving a decree to the plaintiff.

In suits for redemption of kanom the question as to who effected the improvements and to whom compensation money is payable under the Improvements Act is one which has necessarily to be determined before giving relief to plaintiff and consequently the decision of such an issue between co-defendants will be binding upon them in a subsequent suit.

K. Kuttikrishna Menon for Appellant.

K. P. Krishna Menon for Respondent.

N. S.

Madhavan Nair and Thiruvenkatachariar, JJ. C. M. A. No. 38 of 1928.
27th August, 1928.

Guardians and Wards Act, Sec. 25—Appointment of guardian —Claims of father.

As the father is bound under the Hindu Law to maintain the son, a very strong case must be made out before another person is appointed as guardian in preference to the father. The mere fact that the father has married a second wife or ill-treated his first wife is not a sufficient ground to deprive him of the custody of the minor child.

G. Lakshmanna for Appellant.

Ch. Raghava Rao for Respondent.

N. S.

Madhavan Nair and Thiruvenkatachariar, JJ. L. P. A. No. 298 of 1925.
27th August, 1928.

Civil Procedure Code, Sec. 11—Unnecessary decision—If has the effect of res judicata.

In a suit on a mortgage on an objection taken by the mortgagor that the plaintiff alone was not entitled to sue, and that there were others also interested in the mortgage money, those other persons who were minors were added as defendants. These minors put in a written statement disclaiming any interest in the mortgage sued on. The issue which was framed was whether the minor defendants were also interested in the mortgage and whether the suit was barred by limitation on account of their having been added as parties after the period of limitation. The Court found that the plaintiff alone was entitled to the mortgage amount and that therefore the suit was not barred by limitation and granted a decree to the plaintiff. Later on, the persons who were impleaded as minor defendants in the above suit instituted a suit to recover a moiety of the amount recovered by the plaintiff in the previous suit on the allegation that they were joint owners of the mortgage debt. The defendants pleaded that this suit was barred by *res judicata* by reason of the decision in the prior suit.

Held, that for a decision to operate as *res judicata* there must be a *lis* or *contest* between them and it must be necessary to decide that question for giving relief to the plaintiff and that in the present case there was no contest between the plaintiffs in the prior suit and the minor defendants therein and, the decision of the question as to whether the plaintiff alone is solely entitled to the mortgage amount or not was upon an immaterial point as the plaintiff in that suit would have been entitled to get a decree whatever was the decision on that question.

G. Lakshmanna and *K. Venkatarama Raju* for Appellant.

P. Somasundaram for Respondent.

N. S.

Wallace and Thiruvenkatachariar, JJ. C.R.P. No. 1203 of 1925.
27th August, 1928.

Civil Procedure Code, S. 115—Order allowing a claim petition—Revision.

No revision lies to the High Court against an order of the Lower Court allowing a claim petition as the party has a remedy by way of suit.

T. L. Venkatrama Aiyar for Petitioner.

P. N. Appuswami Aiyar for Respondent.

N. S.

The Chief Justice and
Mackay, J. O.S.A. No. 53 of 1927.
28th August, 1928.

Limitation Act, S. 13—Scope of—Exclusion of period of absence from British India—Person absent not a British Indian subject but a foreigner.

Under Sec. 13 of the Limitation Act the plaintiff can exclude the period of absence of the defendant outside British India even though the defendant was not a British Indian subject but a foreigner domiciled outside British India.

V. Ramaswami Aiyar for Appellant.

R. N. Aingar instructed by *V. Varadaraja Mudaliar* for Respondent.

N. S.

Devadoss and
Pakenham Walsh, JJ. A. S. No. 172 of 1924.
28th August, 1928.

Practice—Commission for effecting a partition—Commissioner's Report—No objection taken to the report in the first Court—Whether objection can be taken for the first time in appeal—Civil Procedure Code, O. 26, R. 14 (2)—No power given to Commissioner in warrant of Commission to award sums for equalising shares—Commissioner's report awarding sums to equalise shares—Legality of.

Where a Commissioner is appointed to effect a partition and the Commissioner submitted his report to the Court and no objection is made to the report in the first Court, there is no want of jurisdiction on the part of the Appellate Court to entertain objections to the same for the first time in an appeal from the decree based on the Commissioner's report.

6 M.H.C. 36 and 6 B.H.C.R. 149 referred to.

Where the warrant of Commission did not authorise the Commissioner to award sums to equalise shares, but none the less he awarded sums to equalise shares, the same may be given effect to by the Court, as a recommendation to the Court by the Commissioner.

C. A. Seshagiri Sastri for Appellants.

A. Krishnaswami Aiyar, T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Respondents.

C. A. S.

Devadoss, J. S. R. No. 11458 of 1927.
31st August, 1928.

Court Fees Act, Sch. II, Art. 17-A (3)—Suit by reversioner for a declaration that an adoption by a Hindu widow is untrue and invalid—Dismissal of suit—Appeal—Court-fee payable.

N R C

A reversioner brought a suit for declaration that an adoption by the Hindu widow is untrue, and even if true invalid. He valued it as a declaratory suit and paid a Court-fee of Rs. 100 though the properties to which the litigation related were worth more than Rs. 10,000. The suit was dismissed and an appeal was filed against the same.

Held, that the relief as regards the setting aside of the adoption was one which was capable of valuation, although the plaintiff may not get anything for himself, for if the plaintiff succeeds the adopted son loses his property, and that therefore the proper Court-fee payable was Rs. 500 under Art. 17-A (3) of Sch. II of Court Fees Act.

C. V. Harihara Aiyar for *Advocate-General* for Petitioner.

The Government Pleader for the Government.

N. S.

Madhavan Nair, J. S.A. No. 1805 of 1927.
31st August, 1928.

Limitation Act (1908), Art. 144—Co-owners—Ouster—Usufructuary mortgage by one co-owner—Knowledge of other co-owner.

In order to constitute adverse possession among co-owners there should be proof of ouster. The mere fact that one co-owner has effected a usufructuary mortgage of the common property is not by itself sufficient; there must be further proof that the same was brought to the notice of the other co-owner.

21 A. L. J. 204 followed.

B. Sitarama Rao and *B. V. Viswanatha Aiyar* for Appellants.

R. Jayaram and *T. S. Swaminathan* for Respondents.

N. S.

Devadoss, J. Cr. R. C. No. 934 of 1927.
31st August, 1928.

Survey and Boundaries Act—Prosecution before expiry of three years—Jurisdiction of Criminal Court to try the question of ownership.

A Criminal Court is not precluded from trying the question of ownership in a prosecution launched before the expiry of three years period mentioned in the Survey and Boundaries Act.

T. M. Krishnaswami Aiyar for Accused.

S. Panchapakesa Sastri for Complainant.

The Public Prosecutor for the Crown.

N. S.

Wallace and
Thiruvenkatachari, JJ. C.M.A. No. 408 of 1927.
31st August, 1928.

Execution—Dismissal of a suit by Official Receiver on behalf of insolvent—Decree for costs against the Official Receiver—Personal liability of the Receiver.

Where a suit was instituted on behalf of an insolvent by the Official Receiver, and the same was dismissed with costs, but the decree was not specific about its executability against the Official Receiver for costs personally,

Held, that the Official Receiver was personally liable for the costs awarded in favour of third parties though he could recoup himself from the estate.

51 I. C. 564 and 6 A. C. 484 referred to.

K. Kuttikrishna Menon for Appellant.

P. S. Narayanaswami Aiyar for Respondent.

N. S.

Walsh, J.
31st August, 1928.

C.R.P. No. 699 of 1928.

Civil Procedure Code, Sec. 115—" Case "—Order amending issue.

An order amending an issue in a suit does not amount to a " case " within the meaning of Section 115 of the Civil Procedure Code. No question of jurisdiction is involved in such a case.

C.R.P. No. 697 of 1926 followed.

K. Balasubramania Aiyar for Petitioner.

K. S. Ramabhadra Aiyar and *T. P. Gopalakrishna Aiyar* for Respondent.

N. S.

Odgers, J.
3rd September, 1928.

S. A. No. 1414 of 1927.

Hindu Law—Partition—Suit for, by minors—Death of one minor plaintiff before decree—Whether the share of the deceased lapses to all or only to the plaintiffs.

Where a suit for partition was instituted by three minor plaintiffs against their step-brother, and one minor plaintiff died before the passing of the decree,

Held, that the share of the deceased plaintiff lapsed to all the parties including the defendant, as the severance in interest did not relate back to the institution of the suit but only could arise on the date of decree.

41 M. 442 followed.

48 M. 465 and 50 M. 866 referred to.

A. Krishnaswami Aiyar and *V. Balasundaram Aiyar* for Appellant.

P. Satyanarayana Rao and *Y. Suryanarayana* for Respondent.

N. S.

Coutts-Trotter, C.J.,
Ramesam and Pakenham
Walsh, JJ.
4th September, 1928.

Appeal No. 235 of 1924.

Transfer of Property Amendment Acts XXVII of 1926 and X of 1927—If retrospective—Signatures of the Registering Officer and of identifying witnesses—If attestation.

Held, by the Full Bench—

(1) Acts XXVII of 1926 and X of 1927 are retrospective.

(2) The signatures of the Registering Officer and of the identifying witnesses are a sufficient acknowledgment within the meaning of the Transfer of Property Act

1 Pat. 300 and 47 C. L. J. 118 referred to.

T. V. Venkatarama Aiyar and *T. V. Ramanatha Aiyar* for Appellant.

T. V. Muthukrishna Aiyar and *N. Muthusami Aiyar* for 3rd and 4th Respondents.

T. S. Subramania Aiyar and *T. S. Srinivasa Aiyar* for 8th Respondent.

P. R. N.

Odgers, J.
4th September, 1928.

S. A. No. 906 of 1925.

Civil Procedure Code, S. 102—Suit of a small cause nature—Suit for damages for use and occupation—Question of title arising incidentally.

A suit for the recovery of less than Rs. 500 as damages for use and occupation is of a small cause nature and no second appeal lies.

The test to determine whether a suit is of a small cause nature or not is to find out from the allegations in the plaint whether the suit is one cognizable by the Court of Small Causes. The fact that a question of title incidentally arises, and the plaint is returned for representation on the Original Side will not make the suit cease to be one of small cause nature.

22 Mad. 149, 17 C. 541 and 3 M. 192 referred to.

K. Bhimasankaran for *B. Satyanarayana* for Appellant.

K. Kameswara Rao for Respondent.

N. S.

Odgers, J. S.A. Nos. 851 and 860 of 1925.
4th September, 1928.

Registration Act, Ss. 77 and 34—Suit for compulsory registration—Rules of limitation in S. 34—Applicability.

The plaintiff presented a document to the Registrar for registration eleven months after its execution, and the Registrar refused to register the document as the delay was not explained. In a suit instituted by plaintiff for a decree directing registration of the document,

Held, that S. 77 of the Registration Act was not governed by the period of limitation specified in S. 34 and the jurisdiction and powers of Civil Court in respect of such suits would not be tied down by the provisions as to periods of limitation prescribed in the Registration Act which were more or less departmental rules for the guidance of the Registering Officer.

K. V. Ramachandra Aiyar for Appellant.

S. Ramaswami Aiyar for Respondent.

N. S.

Curgenven, J. Cr. R. C. No. 996 of 1927.
5th September, 1928.

Penal Code, S. 425—Mischief—Destruction or change in value of property—Grazing by goats.

The offence of "mischief" is not committed by the grazing of grass by goats as it does not amount to "a change in the value or destruction" within the meaning of S. 425 of the Penal Code.

V. L. Ethiraj and *P. Krishnamachari* for Complainant.

K. N. Arunachallam Aiyar for Accused.

The Public Prosecutor for the Crown.

N. S.

Reilly, J. Cr. R. C. No. 1060 of 1927.
5th September, 1928.

Evidence Act, S. 74—Notification by Director-General of Post Offices for issue of certain stamps—If a public document.

A notification issued by the Director-General of Post Offices to the effect that chocolate coloured one anna stamps would be issued in the Post Offices, is not a public document within the meaning of S. 74 of Evidence Act.

V. L. Ethiraj, K. P. Padmanabha Pillai and *A. S. Sivakaminathan* for Petitioner.

The Public Prosecutor for the Crown.

N. S.

N R C

Odgers and
Madhavan Nair, JJ. S.A. No. 934 of 1926.
5th September, 1928.

Muhammadan Law—Shafi School—Marriage of an adult virgin without her consent—Validity.

According to the Shafi School, the consent of an adult virgin is necessary for a valid marriage, and the father of the virgin can have no right to give her in marriage without her consent.

B. Sitarama Rao for Appellant.

K. S. Krishnaswami Aiyangar for Respondent.

N. S.

Wallace and
Thiruvenkatachariar, JJ. C.R.P. No. 234 of 1926.
6th September, 1928.

Civil Procedure Code, Sec. 151 and O. 9, R. 9—Ex parte *orders on applications under O. 21, Rules 97 to 100—Applicability—Inherent jurisdiction of Court to set aside the* ex parte *order.*

The following question was referred to a Full Bench :—

" Whether the provisions of O. 9, R. 9, C.P.Code, would be applicable to *ex parte* orders on applications put in under O. 21, Rules 97 to 100, and if the answer is in the negative whether the Court would have inherent jurisdiction in a proper case to set aside the *ex parte* order."

P. R. Srinivasan and *P. N. Appuswami Aiyar* for Petitioner.

S. Krishnaswami Aiyangar for Respondent.

N. S.

Coutts-Trotter, C.J.,
Kumaraswami Sastri and
Pakenham Walsh, JJ.
6th September, 1928.

In re the powers of the newly enrolled statutory advocates on the Insolvency Side.

The Indian Bar Councils Act (1926), Ss. 4 (2), 8, 14 and 19—Construction—Advocate—Right of, to act on the Insolvency Original Side—" Practise '—Meaning of.

Held, that Advocates enrolled under the Indian Bar Councils Act are entitled to act as well as plead on the Insolvency Original Side of the Madras High Court. The word ' practise ' includes both pleading and acting.

A. Krishnaswami Aiyar for the Vakils' Association.

F. S. Vaz for the Bar Association.

V. V. Srinivasa Aiyangar for Attorneys' Association.

P. R. N.

Kumaraswami Sastri, J. O. P. No. 56 of 1928.
6th September, 1928.

Indian Companies Act, Sec. 163 (6)—Petition for winding up by dismissed shareholders—Legality of forfeiture—If can be raised in the petition—Profits declared not distributable till a time—If an ascertained debt.

A director who was removed from the list of shareholders for misconduct over 3 years prior thereto cannot question the legality of forfeiture collaterally in an application by him for winding up of the company. It must be agitated in independent proceedings.

4 Ch. App. 639 followed.

A director who claims a share of profits before they are declared or ascertained for the purpose of distribution cannot be deemed even a future creditor as the debt due to him is unascertained. For presenting a petition as a creditor, the debt due must be an ascertained debt though payable *in presenti* or in future.

(1910) 1 Ch. 574 followed.

N. K. Mohanarangam Pillai for Petitioners.

R. N. Aingar and *T. E. Ramabhadrachariar* for Respondent.

N. S.

Devadoss and Walsh, JJ. A. S. No. 263 of 1924.
12th September, 1928.

Evidence—Registry of property in a Municipal register in the name of a person—Pattas—If evidence of title.

An entry of property in a Municipal register in the name of a person is not any evidence of title of that person to the property. Pattas in respect of lands are evidence only of the engagement between the Government and the pattadar in respect of the kist payable and have very little value as evidence of title.

39 Bom. 664 (P.C.) and 44 All. 674 referred to.

B. Sitarama Rao and *K. Srinivasa Rao* for Appellant.

B. Somayya for Respondent.

N. S.

Ramesam and Reilly, JJ. A. S. No. 292 of 1923.
12th September, 1928.

Specific performance—Agreement to sell in favour of mortgagee—Sale price not fixed—Clog on equity of redemption.

A mortgagee who had advanced large sums of money on the mortgage entered into an agreement to purchase the mortgaged properties as part of the mortgage transaction, though the agreement was on a separate document six days subsequent to the mortgage. This agreement recited that, in consideration of the mortgagee having advanced large sums of money at a low rate of

interest, the mortgagors would sell the mortgaged properties to the mortgagee at a favourable or concession price and that, in default, the mortgagors would be liable to pay enhanced interest.

Held, that the agreement was void on the ground that it was uncertain, no price for the sale having been fixed therein and that it was a clog on the equity of redemption, being restrictive of the rights of the mortgagor and not a right of pre-emption as the sale price was to be less than the market price.

A. Krishnaswami Aiyar for Appellant.

The Advocate-General for Respondent.

N. S.

Devadoss and Mackay, JJ. A. S. No. 146 of 1924.
13th September, 1928.

Hindu Law—Joint family—Property standing in the name of a female member—Presumption—Benami.

There is no presumption that property standing in the name of a female member of a joint Hindu family belongs to the joint family. The burden is upon the person who alleges that it is joint family property to prove that it was purchased with joint family funds *benami* in the name of the female member.

G. Lakshmanna and *V. Viyyanna* for Appellant.

P. Somasundaram, P. Satyanarayana and *K. Ramamurthi* for Respondent.

N. S.

The Chief Justice and Walsh, J. L. P. A. No. 183 of 1927.
13th September, 1928.

Provincial Insolvency Act, Sec. 75, Proviso 2—Appellate order refusing to extend time for discharge—Second appeal.

No second appeal lies against the order of the District Court in appeal refusing to extend the time for discharge under Sec. 27 (2) of the Provincial Insolvency Act.

K. V. Sesha Aiyangar and *N. R. Raghavachari* for *V. C. Seshachari* for Appellant.

T. S. Anantharaman for Respondent.

N. S.

Madhavan Nair, J. S. A. No. 1311 of 1927.
19th September, 1928.

Civil Procedure Code, Sec. 100—Question as to proof of custom—If a question of law—Mahomedan Law—Appointment of Mutawali by Jamait—Validity of.

The question as to proof of a custom is one of mixed law and fact and the evidence can be looked into in Second Appeal to find out whether the custom is legally established or not.

In the case of a public trust such as a mosque, Mahomedan Law does not recognise a right of appointment of Mutawali in the Jamait. A Jamait is merely a congregation of Mahomedan worshippers; and will be a fluctuating and indeterminate body.

V. Ramaswami Aiyar for *K. Rajah Aiyar* for Appellant.

M. A. Azim for Respondent.

N. S.

Madhavan Nair, J. S. A. No. 948 of 1925.
19th September, 1928.

Provincial Small Cause Courts Act, Sch. II, Art. 13—Interest in immoveable property—Suit for recovery of cess—Civil Procedure Code, Sec. 11—Consent decree—When operates as res judicata.

A suit to recover a sum of money on the ground that it is a cess due from the defendant is not one to enforce payment of a cess payable to a person by reason of interest in immoveable property within the meaning of Sch. II, Art. 13 of the Provincial Small Cause Courts Act, where the cess is merely a voluntary payment.

53 M.L.J. 727 followed.

A consent decree would operate as *res judicata* in respect of matters which were specifically put in issue by the defendant in that suit though there was no trial of that issue.

A. Krishnaswami Aiyar for Appellant.

R. Ramamoorthi for Respondent.

N. S.

Madhavan Nair, J. S. A. No. 628 of 1925.
19th September, 1928.

Transfer of Property Act, Sec. 54—Document creating a right of easement over immoveable property—Necessity for registration.

A right of easement is not part of the right of ownership in immoveable property and any dealing of such right does not fall within Sec. 54 of the Transfer of Property Act requiring a registered document. In India, there is no law requiring a document in writing for the creation of a right of easement.

A. I. R. 1926 Mad. 543 followed.

N B C

31 All. 612 referred to.

G. Lakshmanna for *A. Satyanarayana* for Appellant.

Y. Suryanarayana for Respondent.

N. S.

Reilly, J. Crl. R. C. No. 471 of 1928.
20th September, 1928.

Criminal Procedure Code, Secs. 228 and 231—Alteration of charge—Right of accused to have prosecution witnesses recalled for cross-examination.

In the case of an alteration of the charge, the accused has a right to have the prosecution witnesses recalled for further cross-examination, and a Magistrate has no discretion to refuse to recall the witnesses on the ground that the accused would not be prejudiced thereby.

Sec. 231 of the Criminal Procedure Code is not subject to the provisions of Sec. 228.

V. L. Ethiraj, K. S. Desikan and *M. Ranganatha Sastri* for Petitioner.

The Public Prosecutor for the Crown.

N. S.

Wallace and Thiruvenkatachari, JJ. C. R. P. No. 192 of 1926,
21st September, 1928. C. M. P. No. 909 of 1926 and C. R. P. No. 1109 of 1926.

Government of India Act, Sec. 107—Letters Patent, Clause 16—Madras Estates Land Act, Chap. II—Board of Revenue acting under—If subordinate to the High Court.

The following question was referred to a Full Bench : Whether the Board of Revenue acting under Chap. II of the Estates Land Act is a Civil Court, subject to the powers of superintendence of the High Court under Sec. 107 of the Government of India Act or Clause 16 of the Letters Patent.

V. V. Srinivasa Aiyangar, S. Varadachariar, K. Bhashyam Aiyangar and *K. Veeraraghavachariar* for Petitioner.

B. Jagannadha Doss for Respondent.

N. S.

Curgenven, J. C. M. P. No. 2282 of 1928.
1st October, 1928.

Civil Procedure Code, Order 41, Rules 20 and 22—Suit for partition against step-brothers—Defence that plaintiff born deaf and dumb and not entitled to a share—Decree for partition and maintenance to the mother who was a defendant—Appeal by step-brother on the ground that the plaintiff was not entitled to partition—Mother not impleaded as a respondent—Application by respondent in the appeal to bring mother as a party respondent in the appeal—Power of Court to order.

A suit for partition was filed against the step-brother and the mother of the defendant was also impleaded as a defendant. The step-brother pleaded that the plaintiff was born deaf and dumb and, therefore, not entitled to a share. The Court oberruled this plea and decreed the suit. It also decreed maintenance to the mother at a certain rate. The step-brother appealed on the ground that the plaintiff was not entitled to a share, impleading only the plaintiff as the respondent. He did not implead the mother as a party to the appeal. The respondent put in an application to have the mother impleaded as a respondent in the appeal so that he may file memo. of objections as regards the rate of maintenance awarded to her.

Held, that the mother, who had obtained a vested right by the failure of the respondent to appeal against the decree in her favour within the period of limitation could not be said to be a "party interested in the result of the appeal" within the meaning of Order 41, Rule 20 of the Civil Procedure Code, and therefore the Court had no power to implead her as a party to the appeal.

11 L. W. 602 and 6 R. 29 P. C. referred to.

P. Panni Rao for Petitioner.

N. Swaminathan and *M. Ramachandra Rao* for Respondent.

N. S.

Wallace, J. C. R. P. No. 1182 of 1927.
1st October, 1928.

Civil Procedure Code, Order 9, Rule 9—Dismissal of suit for default—Application for restoration—Sufficient cause—What amounts to.

An application was filed for restoration of a suit dismissed for default on the ground that the plaintiff could not attend Court on account of his being stung by a scorpion just about his starting from his village which was situated 25 miles from the Court-house.

This was dismissed on the ground that the applicant's previous conduct in not paying batta for witnesses and not being ready with the witnesses during the previous hearings made it apparent that he would not have attended the Court during this hearing also, even if the scorpion bite had not occurred. The same was confirmed on appeal.

Held, (on revision) that the order of the Lower Court should be set aside, as it did not consider the one question that it should concern itself with in a petition under Order 9, Rule 9, Civil Procedure Code, namely, the sufficiency or otherwise of the reason for the non-appearance of the petitioner on the day of hearing.

M. Ramachandra Rao for Petitioner.

T. Ramachandra Rao for Respondent.

N. S.

Odgers, J. S. A. No. 922 of 1925.
1st October, 1928.

Civil Procedure Code, Order 41, Rule 27—Reception of additional evidence—Duty of Judge to give reasons.

An Appellate Court should give reasons when passing an order for reception of additional evidence; otherwise the order is illegal.

G. Lakshmanna for Appellant.

K. Kameswara Rao for Respondent.

N. S.

Madhavan Nair, J. S. A. No. 1314 of 1927.
2nd October, 1928.

*Civil Procedure Code, Sec. 11—Suit for Rent—*Ex parte *decree—If operates as* res judicata *in a suit for rent for subsequent faslis.*

There is no general principle of law that an *ex parte* decree for rent will be *res judicata* as to the rate of rent in a subsequent suit for rent. The question will depend upon the facts and circumstances of each case as to whether there was an issue for the rate of rent and a decision thereon.

S. Venkatesa Ayyangar for Appellant.

Y. Suryanarayana for Respondent.

N. S.

Wallace and
Thiruvenkatachari, JJ. C. M. Ps. Nos. 2907 and 2908 of 1928.
4th October, 1928.

Civil Procedure Code, Order 47, Rule 1—"Error apparent on the face of the record"—Meaning of.

The "error apparent on the face of the record" in Order 47, Rule 1, Civil Procedure Code, must be one upon any well-established or well-settled principle of law which the Court is bound to follow. Where the error is with reference to certain rules embodied in the Articles of a Company in respect of which there can be alternate constructions, such an error is not one apparent on the face of the record.

3 Lah. 127 and 47 Bom. 578 referred to.

T. R. Venkatarama Sastri and *M. S. Venkatarama Aiyar* for Petitioner.

S. Varadachariar, T. M. Ramaswami Aiyar and *S. T. Sreenivasagopalachari* for Respondent.

Reilly, J. Cr. R. C. No. 352 of 1928.
5th September, 1928.

Criminal Procedure Code, Sec. 250—Magistrate passing tentative order of compensation—Whether illegal.

A Magistrate acquitted the accused, and on the same date passed a tentative order awarding Rs. 50 as compensation to the accused in the absence of the complainant. Subsequently after hearing the complainant the tentative order was made absolute.

Held, that the order though not quite regular was not illegal and ought to be confirmed.

K. S. Jayarama Aiyar for Complainant.

E. Krishnamurthi for Accused.

The Public Prosecutor for the Crown.

N. S.

Coutts-Trotter, C. J. C. S. No. 38 of 1928 and
Beasley and Reilly, JJ. C. S. No. 112 of 1926.
4th October, 1928.

Madras High Court, Original Side Rules—O. 1 R. 7, O. 4, R. 19 and O. 6, R. 4—Scope—Dismissal of suit for default—Application to set aside dismissal made beyond time—Power of Court to restore—Practice.

Where a suit was dismissed under O. 6, R. 4 of the Original Side Rules for failure to file an affidavit of service as provided by O. 4, R. 19, and the plaintiff applied to have such dismissal set aside only after the expiration of 30 days prescribed by Rule 4 of O. 6, and the master refused the application, holding that the Court had no discretion to restore the suit or enlarge the time.

Held, that the Court had a discretion to revive the suit even after the expiry of thirty days and can extend the time under O. 1, R. 7, even though no application was filed within the thirty days fixed by O. 6, R. 4.

L.R. 3 Q.B.D. 83 and L.R. 4 Q.B.D. 402 distinguished.

L.R. (1920) 3 K.B. 140 followed.

K. S. Krishnaswami Aiyangar for Plaintiff in C. S. No. 38 of 1928.

K. P. Padmanabha Pillai for Plaintiff in C.S. No. 112 of 1926.

Defendant in both not represented.

P.R.N.

Madhavan Nair, J. S. A. No. 1117 of 1925.
5th October, 1928.

Malabar Tenants' Compensation Act (I of 1900), Secs. 3, 4 and 5—Improvement by tenant—Lands given on kanom for agriculture—Residential building put up by tenant—If tenant entitled

to compensation on eviction—Constructive waste—Suit brought before expiry of 12 years—Term expiring during pendency of suit—If Court can decree redemption.

Where a Jenmi sued to redeem a kanom before the expiry of the 12 years period, on the ground of waste by the tenant, but the term expired during the pendency of suit,

Held, the Court can give decree for redemption and take notice of events that occur after the suit was filed.

(1918) M.W.N. 199, 37 I.C. 962 and (1916) 1 M.W.N. 354 followed.

Where a tenant of agricultural lands put up in haste a big building with upstairs before expiry of term alleging it was useful for storing paddy and was a farm house,

Held, the building was not an improvement within Sec. 3 of the Act I of 1900 as it was inconsistent with the holding, and with the purpose for which it was let and the tenant cannot claim compensation for the same.

K. P. M. Menon and *K. K. Ranganatha Aiyar* for Appellant.

B. Sitarama Rao and *K. P. Ramakrishna Aiyar* for Respondent.

N. S.

Wallace and Thiruvenkatachari, JJ.
9th October, 1928.

C. M. A. No. 530 of 1925.

Provincial Insolvency Act, Sec. 56—Fraudulent preference—Tests to determine.

The test to be applied to determine the fraudulent nature of an alienation is to determine the dominant motive of the insolvent in effecting the transfer. Where the dominant motive of the insolvent as disclosed by the evidence was not to prefer the particular creditor but to save himself from any action which could ruin his business if that creditor was not satisfied, the alienation cannot be said to amount to a fraudulent preference.

T. M. Krishnaswami Aiyar and *T. M. Ramaswami Aiyar* for Appellant.

S. Varadachariar, S. Ramaswami Aiyar, T. L. Venkatarama Aiyar, K. R. Rama Aiyar and *S. Nataraja Nadar* for Respondent.

N. S.

Odgers, J. S. A. No. 1099 of 1925.
19th September, 1928.

Hindu Law—Joint family—Separation of one brother from others—Other brothers if divided inter se*—Widow—Alienation without necessity—Reversioner obtaining some properties from the alienees—Election.*

Where one brother separates from his two other brothers and takes away his share of the family properties, there is no presumption either that the other two are divided *inter se* or that they remain joint and their joint or separate status must be proved in the ordinary way.

45 M. L. J. 355 (P.C.), 30 Cal. 725 (P.C.) and 48 M. L. J. 83 (P.C.) referred to.

Where a Hindu widow alienated certain properties belonging to her husband's estate without legal necessity and the reversioner obtained for his minor daughter by way of maintenance some of the properties so alienated from the alienees who were her brothers-in-law

Held, that there was no "election to hold the deed good" within the meaning of 42 Mad. 523 (P.C.) as to debar the reversioner from claiming the other alienated properties after the widow's death.

Ch. Raghava Rao for Appellants (Alienees).

V. Govindarajachari for Respondents (Reversioner).

N. S.

Mackay, J. C. R. P. No. 1245 of 1927.
20th September, 1928.

Arbitration—Reference by guardian on behalf of minor—Validity—Award based partly on personal knowledge of arbitrators—Validity.

A reference to arbitration by a guardian on behalf of a minor is not invalid by reason of the fact that she consented to abide by the decision of a majority of the arbitrators.

38 M. L. J. 145 referred to.

Where a guardian consented to the arbitrators deciding with or without enquiry, but the decision of the arbitrators was based partly on evidence and partly on personal knowledge,

Held, that the award is valid and binding on the minor.

47 Mad. 30 and (1926) M. W. N. 445 referred to.

V. Govindarajachari for Petitioner.

Y. Suryanarayana for Respondent.

N. S.

N R C

Odgers, J. S. A. No. 2152 of 1927
8th October, 1928.

Negotiable Instruments Act, Sections 35, 94, 101, 102 and 119—Dishonour of Bill of Exchange by the drawer—Notice of dishonour to endorser—Mere demand for payment if amounts to notice of dishonour.

Where a Bill of Exchange has been dishonoured by the drawer, the payee in order to make the endorser liable must give a proper notice of dishonour under Section 94. The mere demand for payment does not amount to a notice of dishonour.

107 E. R. 1085 followed.

A mere protest will not amount to a notice of dishonour.

K. P. Ramakrishna Aiyar for Appellant.

K. Krishnaswami Aiyangar for Respondent.

N. S.

Reilly, J. Cr. R. C. No. 338 of 1928.
10th October, 1928.

Criminal Procedure Code, Sections 222, 225 *and* 233*—Entrustment of cocoanut husks for soaking—Single charge for deficiency of husks—Different sales alleged—Validity of single charge.*

Where the accused was charged with the offence of criminal breach of trust for not having accounted for 6,300 husks out of 1 lakh and odd of cocoanut husks entrusted to him for soaking, but the prosecution proved that the accused has sold these husks to different persons,

Held, the charge was bad as three distinct offences of criminal breach of trust had been alleged and the accused ought to have been charged separately for the same.

Semble: If section 222 applies only to cases of entrustment of money or to things also.

K. P. Ramakrishna Aiyar for Petitioner.

Venkataraghavachari for Public Prosecutor.

N. S.

Devadoss and Walsh, JJ. A. S. No. 166 of 1926.
12th October, 1928.

Malabar Law—Acquisition by sthanee—Devolution of.

An acquisition made by a sthanee, unless it has been specifically made over to the sthanam, will go to the Tarwad of the sthanee. The onus of proving a custom in derogation of this law is upon the person who pleads the custom.

K. P. M. Menon and *P. Govinda Menon* for Appellant.

B. Sitarama Rao and *D. A. Krishna Variar* for Respondent.

N. S.

The Chief Justice,
Ramesam, Odgers, Venkatasubba Rao and Mackay, JJ.
12th October, 1928.

O. S. A. No. 95 of 1926.

Letters Patent (Madras), cl. 12—"Suit for land"—Meaning of—Contract for sale of land situate outside the Madras City—Suit by prospective purchaser for specific performance of—If a suit for land—Maintainability on the Original Side of the High Court.

Held by the Full Bench.—A suit by a prospective purchaser for the specific performance of a contract for the sale of land situate outside the City of Madras is not a 'suit for land' within the meaning of clause 12 of the Letters Patent and is maintainable on the Original Side of the High Court where the defendants reside within the limits of its ordinary original jurisdiction.

A suit for specific performance is only an action *in personam*, while a 'suit for land' is an action *in rem.*

A suit for specific performance of a contract for the sale of land should not be regarded as suits for maintenance charged on land, suits for compensation for trespass on immoveable property or suits on mortgages.

T. M. Krishnaswami Aiyar and *M. Subbaroya Aiyar* for Appellants.

K. S. Krishnaswami Aiyangar and *T. Ramachandra Rao* for Respondents.

P. R. N.

Madhavan Nair and Thiruvenkatachari, JJ.
12th October, 1928.

C. M. P. No. 327 of 1928.

Civil Procedure Code, Sec. 110—Confirming judgment—Slight variation—Effect.

In order to constitute a judgment of the High Court not a confirming judgment, the point of variance must be one affecting the particular subject-matter proposed to be taken up on appeal to the Privy Council.

51 Cal. 969 (P.C.) explained.

B. Somayya for Petitioner.

L. A. Govindaraghava Aiyar for Respondent.

N. S.

Reilly, J.
12th October, 1928.

Cr. Appeal No. 249 of 1928.

Criminal Procedure Code, S. 476—Complaint under—Contents of.

An order under Sec. 476, Criminal Procedure Code, must contain reasons in writing and must also contain a finding that the enquiry is necessary in the ends of justice.

Y. Suryanarayana for Appellant.

K. Venkatavaradachari for the Public Prosecutor.

N. S.

Mackay, J. S. A. No. 828 of 1925.
15th October, 1928.

Contract—Immoveable property—Time when of the essence of contract.

Time is of the essence in a contract to the recovery of immovable property and the terms of the contract must be strictly complied with.

Where a contract to recover immovable property provided that the purchase money should be paid in three equal annual instalments and that on such payment the property should be recovered but the amount was not paid in such instalments though it was duly tendered before the expiry of the third year

Held, the contract was not complied with and specific performance of the agreement to recover could not therefore be decreed.

42 Mad. 802, Fisher on Mortgages, Part II, Ch. I, S. 18, Fry on Specific Performance, Section 1103, 39 E. R. 195 and 7 E. R. 62 referred to.

V. Govindarajachari for Appellants.

The Hon'ble Mr. *V. Ramadoss* for Respondent.

N. S.

Kumaraswami Sastri, J. C. S. No. 156 of 1928
17th October, 1928.

Transfer of Property Act, Secs. 100 and 127—Settlement—Settlement of house to a person subject to a prior life-estate—Direction to pay a specific amount when taking the property—Charge.

A settlement deed was executed by which some properties were given absolutely to a person subject to a life-estate and he was directed to pay a certain amount to another when taking the property. There was no clause directing that the amount should be paid out of the value of the house.

Held, that no charge was created in favour of the person to whom the amount was directed to be paid.

38 Mad. 500 followed.

42 Mad. 581 distinguished.

B. Somayya for Plaintiff.

V. Ramaswami Aiyar for Defendant.

N. S.

The Chief Justice and
Mackay, J.
15th October, 1928.

O. S. A. No. 79 of 1927.

Execution—Attachment—Increase of decree amount by the Appellate Court—Attachment if enures for this increased amount—Civil Procedure Code, Order 38, Rule 9—Dismissal of suit—Failure to order withdrawal of attachment—Effect—Adjudication of defendant as insolvent—Effect on attachment—Right of Official Assignee to object to alienation by the judgment-debtor.

The following questions were referred to a Full Bench :—

1. Where the Appellate Court allows the claim dismissed by the Original Court or varies the decree of the Original Court by allowing a larger amount, does the attachment enure to the amount decreed by the Appellate Court?

2. Where a Court dismissing a suit fails to order the withdrawal of an order for attachment before judgment as required by Order 38, Rule 9, does the attachment continue notwithstanding the fact of the dismissal of the suit?

3. Does an attachment before judgment subsist after the adjudication of the defendant as an insolvent?

4. If the Question (3) be answered in the affirmative, can the Official Assignee object to an alienation by the judgment-debtor subsequent to the attachment.

V. V. Srinivasa Aiyangar, T. D. Srinivasachari and *T. Chakravarti Aiyangar* for Appellants.

K. S. Krishnaswami Aiyangar and *K. Krishnaswami Aiyangar* for Respondents.

N. S.

The Chief Justice,
Kumaraswami Sastri, Wallace,
Beasley and Pakenham Walsh, JJ.
18th October, 1928.

S. R. No. 12176 of 1928.

Letters Patent (Madras)—Amended Letters Patent (1928)—Applicability—Clause requiring certificate of leave to file Letters Patent Appeal from a decision of a single Judge in Second Appeals—Operation of—Right of appeal—Law governing.

A Second Appeal arising out of a suit of the year 1920 was filed in the High Court on the 15th July, 1924, and was finally disposed of by a single Judge of the High Court on the 9th February, 1928. A Letters Patent Appeal was filed against the decision on the 24th April 1928. The Amended Letters Patent, requiring a certificate of leave to file such an appeal, having come into force on the 31st January, 1928, the question arose, whether in this case, such a certificate was necessary or whether the party had a right to file the same without such certificate as under the old Letters Patent.

N R C

Held by the Full Bench.—(i) That the case was governed not by the Amended Letters Patent, but by the old Letters Patent and that no certificate of leave to file a Letters Patent Appeal was necessary.

(ii) The right of appeal is a substantive right and is governed by the law which prevailed at the time the suit was commenced, and cannot be deemed to be taken away by a later enactment, unless the enactment expressly or by necessary implication abrogates that right.

(1905) A.C. 369 (P.C.) and 48 C.L.J. 150 (F.B.) followed.

A. Krishnaswami Aiyar and *T. S. Srinivasa Aiyar* for Appellant.

The Government Pleader for the Office.

P. R. N.

Wallace and
Thiruvenkatachari, JJ. C. M. A. No. 414 of 1927.
25th October, 1928.

Insolvency—Composition scheme—Acceptance of—Subsequent annulment of insolvency—Right of creditor to prove claim subsequent to annulment.

A creditor of an insolvent whose adjudication has been annulled on the acceptance of a composition scheme by the court can prove his claim in insolvency subsequent to the annulment so as to be entitled to get the benefit of the composition scheme.

V. Ramaswami Aiyar for Appellant.

V. S. Narasimhachari for Respondent.

N. S.

Venkatasubba Rao
and Walsh, JJ. S. A. No. 1433 of 1925.
26th October, 1928.

Promissory note—Construction—Note in the name of a person who was described as a guardian of a minor—Guardian whether the real payee of the note.

A promissory note recited that it was executed to one 'L' who was the guardian of a minor 'R' and that that note was executed for the balance of the amount due in respect of an earlier promissory note executed in favour of one 'S' as guardian of the minor 'R'. The question arose as to who was the real payee under the note, the guardian himself or the minor represented by the guardian.

Held, that the real test was to find out from the language of the instrument who was the real payee under the note and the recital in the pronote showed that it was the minor who was the real payee.

T. V. Muthukrishna Aiyar for *K. V. Krishnaswami Aiyar* for Appellant.

R. Kesava Aiyangar for Respondent.

N. S.

Madhavan Nair, J. S. A. No. 1049 of 1925.
26th October, 1928.

Contract—Offer and acceptance.

The plaintiff who was a merchant in Quilon after some preliminary enquiries from the defendant who was a rice merchant in Rangoon sent him a telegram to send thousand bags of rice by March shipment. The defendant replied that steamers were expected shortly and that he will inform afterwards. The plaintiff treating this as an acceptance of his offer brought a suit for damages for breach of contract. The defendant pleaded that there was no concluded contract between the parties.

Held, that the reply of the defendant was not an acceptance of the plaintiff's offer but was only a further stage in the negotiations between the parties in respect of the shipment of rice.

T. V. Muthukrishna Aiyar for Appellant.

P. Venkataramana Rao for Respondent.

N. S.

Waller, J. Cr. Rev. Case No. 601 of 1928.
29th October, 1928.

Evidence Act, Sec. 30—Confessional statement by co-accused in the dock—Admissibility.

The confessional statement made by a co-accused in the dock cannot be treated as a confession under Sec. 30 of the Evidence Act.

45 All. 324 approved.

38 Mad. 302 doubted.

N. K. Mohanarangam Pillai for Petitioner.

The Public Prosecutor for the Crown.

N. S.

The Chief Justice,
Beasley and Reilly, JJ. O. P. No. 165 of 1928.
29th October, 1928.

Income-tax Act (1922), Ss. 33 (2), 66 (2), proviso—Applications for review and reference—Review decided partly in favour of assessee—Orders passed on both on the same day—Fees paid in respect of application for reference—Refund of.

An assessee preferred an application for review as well as an application for reference. On the application for review the Commissioner decided one point in favour of the assessee and the rest against him. The reference application was not argued as it involved the same point as the review application. The Commis-

sioner, however, disposed of the two applications together by the same order. Six months later, the assessee applied for refund of the fees deposited by him under S. 66 (2), stating that he did not wish to proceed with the application for reference in the High Court, but the Commissioner, holding that the application could not be withdrawn, as it had already been decided and refused to refund the amount.

Held, that the Commissioner was not right in disposing of the two applications together and that the proper course was to decide the review application first so as to give an opportunity to the assessee to withdraw or not the reference application and that in the circumstance the fees deposited should be refunded to the assessee.

K. P. Ramakrishna Aiyar for Assessee.

M. Patanjali Sastri for the Commissioner of Income-tax.

P. R. N.

The Chief Justice,
Madhavan Nair and Jackson, JJ. L. P. A. No. 93 of 1926.
1st November, 1928.

Hindu Law—Widow—Gift by—Presumptive reversioner consenting without receiving any benefit—Right to question the alienation after widow's death—Estoppel.

Where a Hindu widow made a gift and the presumptive reversioner executed a deed of relinquishment in favour of the alienee, consenting to such gift, during the widow's lifetime, but later sued for declaring such alienation as not valid and binding on the reversion and contended that he was not estopped from questioning the alienation as he had received no benefit for the consent he had given :

Held, that he having consented to the alienation in question, though without receiving any benefit, the consent operated as a bar and that he was not entitled to question the validity of the alienation if he became the actual reversioner on the death of the widow.

V. Govindarajachari for Appellant.

Ch. Raghava Rao for Respondent.

P. R. N.

Wallace and
Thiruvenkatachari, JJ.
1st November, 1928.

C. C. C. A. No. 25 of 1926.

Limitation Act, Art. 44—Sale by guardian of minor—Suit by a transferee from the minor to set aside sale—Limitation.

A suit to set aside a sale made by the guardian of a minor must be brought within three years of the date of attainment of majority by the minor, whether the suit is instituted by the minor himself or by a transferee from him.

M. S. Venkatarama Aiyar and *K. Aravamuda Aiyangar* for Appellant.

K. Ramanadha Shenai and *Sanjeevi Kamath* for Respondent.

N. S.

Devadoss and
Walsh, JJ.
1st November, 1928.

A. S. No. 203 of 1925.

Hindu Law—Illegitimate son of a Sudra—Right to a share in the family properties of his putative father.

An illegitimate son of a Sudra is not entitled to obtain a share in the family properties of his putative father who died leaving behind him his undivided brothers and brothers' sons.

S. Varadachari and *K. Narasimha Aiyangar* for Appellant.

T. R. Venkatarama Sastri, K. Bhashyam Aiyangar and *K. Raghavachari* for Respondent.

N. S.

Reilly, J.
1st November, 1928.

Cr. M. P. No. 753 of 1928.

Criminal Procedure Code, Sec. 497 (5)—Bail granted by a High Court—Power of Magistrate or Sessions Judge to cancel the bail.

Under Sec. 497 (5) of the Criminal Procedure Code it is only the High Court that can cancel the bail granted by it.

N. Kunjidapadam for Accused.

The Public Prosecutor for the Crown.

N. S.

The Chief Justice,
Kumaraswami Sastri and
Pakenham Walsh, JJ.
2nd November, 1928.

C. S. No. 145 of 1925.

Limitation Act, Arts. 66 and 116—Applicability—Registered mortgage deed—Personal covenant—Suit to enforce—Limitation—Article applicable.

N R C

Art. 116 and not Art. 66 of the Limitation Act governs a suit to enforce the personal covenant in a registered mortgage bond, the period of limitation being six and not three years.

Observations of the Privy Council in 7 A. 502 and 5 Pat. 585 explained.

K. S. Krishnaswami Aiyangar and *P. S. Ramaswami Aiyangar* for Plaintiff.

V. V. Srinivasa Aiyangar and *T. M. Seshachela Aiyar* for Defendant.

P. R. N.

Wallace and Thiruvenkatachari, JJ. L. P. A. No. 46 of 1928.
7th November, 1928.

Letters Patent (Madras), clause 15—Judgment—Order staying further proceedings on terms pending an appeal from the preliminary decree in a mortgage suit.

An order staying further proceedings on terms pending an appeal from the preliminary decree in a mortgage suit is not a "judgment" within the meaning of clause 15 of the Letters Patent and is therefore not appealable.

35 M. 1 (F. B.) referred to.

K. S. Venkatramani for Appellant.

T. M. Ramaswami Aiyar for Respondent.

N. S.

The Chief Justice and Walsh, J. O. S. A. No. 38 of 1926.
8th November, 1928.

Hindu Law—Joint family—Separation of one member from the other members—Subsequent partition between the other members—Share of separated member if can be taken into account.

The following question was referred to a Full Bench :—" If a member of a joint Hindu family gets separated from the other members, should his share be taken into account in a subsequent partition between the other members who remained joint for the purpose of calculating their shares as held in 5 Mad. 362."

K. S. Krishnasami Aiyangar and *P. V. Sudarsana Raju* for Appellant.

V. V. Srinivasa Aiyangar, T. L. Venkatarama Aiyar and *V. Ramaswami Aiyar* for Respondent.

N. S.

The Chief Justice and Walsh, J. S. A. No. 1488 of 1925.
8th November, 1928.

Contract Act, Sections 107 and 176—Right of sale of pledgee—Pledgee if bound to sell at the most favourable price.

The provisions of section 176 of the Contract Act are not analogous to section 107 and a pledgee is not bound to sell the pledged article at the most favourable price.

S. Varadachariar and *N. Muthuswami Aiyar* for Appellant.

N. S. Srinivasa Aiyar for Respondent.

N. S.

Walsh, J. C. R. P. No. 633 of 1928.
9th November, 1928.

Madras District Municipalities Act, Sections 49 to 51—Disqualification of elected Councillor—Remedy.

The following question was ordered to be referred to a Bench or Full Bench :—

" Can the disqualification of an elected Councillor under Sections 49 and 50 of the Madras District Municipalities Act be made the subject-matter of an election petition or is the remedy limited to an application under Section 51 or 314 of the Act."

K. Bhashyam Aiyangar for Petitioner.

T. M. Krishnaswami Aiyar and *T. E. Ramabhadrachariar* for Respondent.

N. S.

The Chief Justice and Walsh, J. L. P. A. No. 263 of 1925.
9th November, 1928.

Transfer of Property Act, Sec. 52—Lis pendens—*First mortgagee obtaining a second mortgage and filing a suit on both—Decree and Court sale pending ejectment suit—Purchaser if affected.*

The following question was referred to the decision of a Full Bench :—

" If during the pendency of a suit for ejectment against a person in respect of an item of immoveable property, the first mortgagee from that person on that property obtains a second mortgage over the same property, files a consolidated suit upon both the mortgages, and in execution of the decree in that suit the property is purchased in Court auction, is the auction purchaser affected by the doctrine of *lis pendens* by the decree passed in the ejectment suit."

S. Varadachariar, K. Sundara Rao and *P. Vedachala Aiyar* for Appellant.

B. Sitarama Rao for Respondent.

N. S.

Wallace and Madhavan Nair, JJ.
9th November, 1928.

C. M. A. Nos. 193, 487 and 566 of 1925, 135, 137 and 407 of 1926, and 143 of 1927.

Civil Procedure Code, Order 21, Rule 22—Execution application—Death of judgment-debtor subsequent to application—No application to bring legal representative on record filed—Absence of notice to his sons—Effect.

The omission to give notice to the judgment-debtor under Order 21, Rule 22, C. P. Code, amounts to an illegality which will vitiate the Court sale. But, if at the time the execution application is filed, the judgment-debtor is properly represented, his subsequent death and the omission to bring his proper legal representatives on record do not vitiate the sale.

S. Varadachariar, C. Padmanabha Aiyangar and *T. M. Ramaswami Aiyar* for Appellants in C. M. A. No. 487 of 1925.

The Advocate-General, T. R. Ramachandra Aiyar, A. Krishnaswami Aiyar, M. Subbaroya Aiyar, V. Ramaswami Aiyar, K. Umamaheswara Aiyar, R. Rangaswami, S. Krishnaswami Aiyangar and *M. Patanjali Sastri* for Respondents in C. M. A. No. 487 of 1925.

A. Krishnaswami Aiyar, T. M. Krishnaswami Aiyar and *K. Umamaheswara Aiyar* for Appellants in C. M. A. No. 566 of 1925.

T. R. Ramachandra Aiyar, T. M. Ramaswami Aiyar, M. Subbaroya Aiyar, V. Ramaswami Aiyar, P. N. Appuswami Aiyar, S. Srinivasa Aiyar and *M. Patanjali Sastri* for Respondents in C. M. A. No. 566 of 1925.

N. S.

Odgers and Curgenven, JJ. A.S. Nos. 281 of 1925 and
13th November, 1928. 196 of 1926.

Part-performance—Vendor suing the vendee in ejectment—Sale deed not registered on account of vendee's default—Plea of part-performance if can be set up in defence.

Where the plaintiff agreed to sell certain lands to the defendant and in pursuance of the said agreement put the defendant in possession, executed a sale-deed which, however, was not registered on account of no fault of the vendor, and the vendor subsequently sued the vendee for ejectment, *held,* that the defendant-vendee could not set up in defence the equitable doctrine of part-performance.

Essentials of the doctrine of part-performance pointed out.

Ch. Raghava Rao for Appellant.

P. Satyanarayana Rao for Respondents.

N.S.

Curgenven, J. Cr.R.C. No. 373 of 1928.
13th November, 1928.

Criminal Procedure Code, S. 265 (2) & (3)—*Bench of Magistrates—Judgment signed only by the President and not by the other members of the Bench—Validity.*

The failure of the Magistrates forming the Bench of Magistrates to sign the judgment is an illegality, although the judgment has been signed by the President, and the conviction must be set aside.

M. A. T. Coelho for Petitioner.

K. S. Vasudevan for *The Public Prosecutor* for the Crown.

N.S.

Wallace and Thiruvenkatachariar, JJ. L.P.A. No. 116 of 1926.
14th November, 1928.

Provincial Insolvency Act (III of 1907), *S.* 16 (2) (*b*)—*Suit by attaching creditor under Order* 21, *Rule* 63 *to set aside claim order—Insolvency of judgment-debtor subsequent to claim order but before the filing of the suit—Leave of Court—Necessity of—Decree in suit filed without such leave—Validity.*

Where, subsequent to the order on a claim petition allowing the claim, the judgment-debtor was adjudicated insolvent and subsequently the attaching creditor filed a suit under O. 21, R. 63 of the Civil Procedure Code to set aside the claim order without obtaining the leave of the Insolvency Court and obtained a decree declaring that the property was that of the judgment-debtor,

Held, (1) that the attaching creditor's suit was not such a suit as was contemplated by section 16 (2) (*b*) of the Provincial

Insolvency Act of 1907 and therefore leave of the Insolvency Court was not necessary to the suit, and

(2) that, even if such leave was necessary, the decree passed in the suit without such leave, no objection having been raised by the defendant, was null and void.

B. Somayya for Appellant.

T. M. Krishnaswami Aiyar and *B. C. Seshachala Aiyar* for Respondent.

N.S.

Kumaraswami Sastri, J. C.S. No. 473 of 1928.
20th November, 1928.

Civil Procedure Code, Order 40, *Rule* 1—*Suit on simple mortgage—Jurisdiction of Court to appoint receiver.*

Ordinarily, a Court will not appoint a receiver in a suit on a simple mortgage; but where the mortgage security is insufficient, the Court will have jurisdiction to appoint a receiver.

Cases on the subject reviewed.

A. Suryanarayana for Plaintiff.

K. S. Krishnaswami Aiyangar and *T. N. C. Srinivasavaradachari* for Defendant.

N.S.

Wallace and Thiruvenkatachariar, JJ. C.M.P. Nos. 2056 to 2068 of 1928.
21st November, 1928.

Civil Procedure Code, S. 109 (*a*)—*Final order—Order of remand.*

Where the High Court reversed the decision of the Lower Court and remanded the case for trial to the Lower Court, holding that the Civil Court had jurisdiction to try the case, *held*, that the order was a "final order" within the meaning of S. 109 (*a*), Civil Procedure Code.

41 M. 724 and 43 M. 166 referred to.

46 M. 92 followed.

V. Ramadas and *P. Satyanarayana Rao* for Petitioner.

Ch. Raghava Rao for Respondent.

N.S.

Waller and Madhavan Nair, JJ S.A. No. 1452 of 1925.
23rd November, 1928.

Easement—Natural right and customary right—Right to drain rain water collected on one's land over adjacent owner's land—Similar right to drain off water collected for agricultural purposes.

The right to drain off rain water falling on one's land over the adjacent owner's land is a natural right but the right to drain off water brought or collected on one's land for purposes of agriculture over the adjacent owner's land is not a natural right but a customary right.

B. Sitarama Rao for Appellant.

K. S. Sankara Aiyar for Respondent.

N.S.

Phillips and Thiruvenkatachariar, JJ. A.S. No. 286 of 1924.
27th November, 1928.

Forest Act, Ss. 18 *and* 21*—License granted under the Act—Licensee employing agents—Partnership—Legality.*

In respect of licenses granted under the Forest Act the licensee is permitted to employ agents for the purpose of cutting or transporting timber.

A partnership entered into by the licensee with other persons by which they agreed to finance him in the cutting and transporting of timber and the sale of the produce in return for a share of the profits is not illegal.

A. Krishnaswami Aiyar and *A. Satyanarayana* for Appellant.

C. S. Venkatachariar, P. Somasundaram, P. Satyanarayana, T. M. Krishnaswami Aiyar and *A. Venkatachalam* for Respondent.

N.S.

Devadoss and Waller, JJ. Cr.R.C. No. 424 of 1928.
27th November, 1928.

Evidence Act, S. 132*—Privilege by witness—When can be claimed—English Law.*

The rule of absolute privilege which obtains in England with regard to statements of a witness is not applicable to India.

A witness can claim privilege under section 132 of the Evidence Act only if he has been compelled to answer such questions and claimed privilege before answering such questions.

V. L. Ethiraj and *A. S. Sivakaminathan* for Petitioner.

T. K. Srinivasathathachari for Complainant.

The Public Prosecutor for the Crown.

N.S.

Waller and Madhavan Nair, JJ. L.P.A. No. 198 of 1925.
29th November, 1928.

Practice—Second appeal—New plea that suit barred by S. 47 *of the Civil Procedure Code—If can be raised.*

A plea that the suit is barred by section 47 of the Civil Procedure Code ought not to be allowed to be raised for the first time in second appeal.

32 M. 425 referred to.

B. Somayya for Appellant.

B. Sitarama Rao and *K. V. Sesha Aiyangar* for Respondent.

N.S.

Phillips, J. C.R.P. No. 245 of 1928.
29th November, 1928.

Civil Procedure Code, Order 32, *Rule* 3—*Appointment of guardian on false affidavit—Minor if can be said to be properly represented.*

Where a Court guardian was appointed for a minor defendant on a false allegation contained in the affidavit of the plaintiff that the testamentary guardian of the minor declined to act as guardian,

Held, that the minor should be deemed not to have been represented at all and the decree against him must be set aside.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Petitioner.

T. S. Anantaraman for Respondent.

N.S.

Wallace and Thiruvenkatachariar, JJ. S.A. No. 209 of 1925.
29th November, 1928.

Decree—Wrong person bona fide *impleaded as legal representative—Decree against—If binds the proper legal representative.*

Where a wrong person is brought on record as the legal representative in good faith, he must be taken to represent the estate sufficiently and a decree passed against him binds the estate.

E. Krishnamurthi for Appellant.

Y. Suryanarayana for Respondent.

N.S.

Waller and Madhavan Nair, JJ. L.P.A. No. 179 of 1927.
29th November, 1928.

Letters Patent, clause 15—Order of remand by single Judge of High Court—Absence of appeal from the order—Final decree by single Judge of High Court after remand—Appeal—Legality of remand order if can be questioned.

The fact that a person did not appeal from the order of remand passed by a single Judge of the High Court does not prevent him from questioning the legality of the order of remand in an appeal from the final decree of the single Judge passed after the order of remand. Clause 15 of the Letters Patent is not controlled by section 105 of the Civil Procedure Code.

T. R. Ramachandra Aiyar, S. Krishnamachariar and *K. P. Ramakrishna Aiyar* for Appellant.

C. Narasimhachariar for Respondent.

N.S.

The Chief Justice,
Odgers and Beasley, JJ. O.P. No. 138 of 1928.
29th November, 1928.

Income-tax Act, S. 10 (2) (*vi*)—*Business of firm as going concern taken over by another firm—Machinery of—Depreciation allowance for—Arrears of—Succeeding firm—Right of to deduction of arrears in computing profits.*

Where the business of a firm was taken over as a going concern by another firm, and such old firm was entitled to a deduction of arrears of depreciation allowance in respect of machinery, *held,* that under section 10, clause (2), sub-clause (*vi*) of the Income-tax Act the succeeding firm was entitled to claim deduction of such arrears of depreciation allowance on the basis of the original value of the machinery in computing profits for purposes of income-tax.

M. Patanjali Sastri for the Commissioner of Income-tax.

Nugent Grant for Assessee.

P.R.N.

Phillips, J. C.R.P. No. 47 of 1928.
29th November, 1928.

Practice—Appointment of guardian to one who is neither a minor nor a lunatic—Validity.

Where the whereabouts of a party who was not a minor were not known and on the evidence he could be presumed neither to be mad nor dead and the Lower Court appointed his wife as his guardian to look after his interests in the proceedings,

N. R. C.

Held, that the Court had no jurisdiction to appoint the guardian but must have only directed substituted service of summons and proceeded *ex parte.*

4 Pat. 378 not followed.

T. S. Venkatesa Aiyar for Petitioner.

K. S. Desikan and *S. Panchapagesa Sastri* for Respondents.

N.S.

Odgers and Jackson, JJ. L.P.A. No. 425 of 1926.
5th December, 1928.

Will—Construction—Devise of properties in favour of second wife—"Hukdarlu"—Limited or absolute estate.

Where a husband after discarding his first wife for unchastity, devised his properties, moveable and immoveable, in favour of his second wife and made her the "Hukdarlu" of the properties,

Held, that in the absence of words of sufficient amplitude to confer an absolute title, the mere use of the term "Hukdarlu" would only give her such right or title as a Hindu widow would get.

P. Satyanarayana Rao for Appellant.

B. Somayya and *V. Suryanarayana* for Respondent.

N.S.

Wallace and Madhavan Nair, JJ. L.P.A. No. 334 of 1926.
6th December, 1928.

Hindu Law—Adoption—Illatom—If applicable among Tamil Udayar community.

The custom of Illatom adoption is known only in Telugu districts and not applicable among the Tamil Udayars of Trichinopoly district.

A. V. Narayanaswami for Appellant.

V. Viswanatha Sastri for Respondent.

N.S.

[END OF VOL. LV.]